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[*Bausemer v. Texas Utilities Electric*](#), 91-ERA-20 (Sec'y Oct. 31, 1995)

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DATE: October 31, 1995
CASE NO. 91-ERA-20

IN THE MATTER OF

FRANK BAUSEMER,

COMPLAINANT,

v.

TU ELECTRIC,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the Recommended Decision and Order (R. D. and O.) issued on January 31, 1992, by the Administrative Law Judge (ALJ) in this case arising under Section 210 (employee protection provision) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988).[1] The ALJ has recommended that the complaint of retaliatory blacklisting be dismissed because it is time-barred and because Complainant failed to prove that Respondent unlawfully denied him employment. While I disagree with the ALJ on the timeliness issue, I agree that Complainant has not prevailed on the merits of the complaint. Accordingly, the ALJ's decision is adopted as explained below.

FACTUAL BACKGROUND

Between October 1987 and March 1988 and during most of 1989, Complainant Frank Bausemer was employed at the Comanche Peak Steam Electric Station (CPSES), a two-unit nuclear power plant located at Glen Rose, Texas. CPSES is owned and operated by Respondent Texas Utilities (TU) Electric Company which utilized a multitude of contractors for construction and operation of the plant, including Ebasco Services, Inc., Fluor Daniel, Inc., and

[PAGE 2]

Brown and Root, Inc. During 1989 Complainant was employed at CPSES by Fluor Daniel as a Quality Control receiving inspector. Receiving inspectors operate within Respondent's Procurement Quality Assurance group and are responsible for inspecting incoming material to ensure that it meets applicable standards.

Complainant was laid off effective November 3, 1989.

Complainant was notified of his layoff on the afternoon of the November 2 "Thermo-Lag incident." Earlier, Complainant and Forbee Harper, another Quality Control receiving inspector, had discovered that a large percentage of Thermo-Lag panels were deficient in that they failed to meet minimum thickness requirements.[2] An argument ensued after Willie Wolfe, a lead inspector, instructed Complainant and Harper to report the deficient panels and Greg Bennetzen, a superior, countermanded the instruction. Bennetzen considered Complainant to be a "knit-picking" inspector and had threatened to lay him off if he ever were in a position to do so. Hearing Transcript (T.) 8/21/91 at 473.

Complainant thereafter complained to the Citizens' Association for Sound Energy (CASE), a nuclear safety citizens' group; the CPSES SAFETEAM, an employee concern contractor; and the Nuclear Regulatory Commission (NRC). Complainant also filed an ERA section 210 discrimination complaint against TU Electric, Fluor Daniels, and Brown and Root. In settlement of the complaint, the respondents agreed that Complainant "will be fairly and equitably considered for any further employment at CPSES Unit 2, when construction commences, and during refueling outages at Unit 1, provided that he apply for and be qualified for the positions available at [CPSES]." TU Electric was cited by the NRC as the result of the Thermo-Lag incident and paid a fine of \$25,000. The Notice of Violation provided in part:

[O]n November 2, 1989, Quality Control receipt inspectors were not provided with adequate authority and organizational freedom to identify quality problems and initiate, recommend and provide solutions in that, they were told by their supervisors that defective [Thermo-Lag] conduit sections were not to be documented on nonconformance reports as required by station procedures.

Complainant Exhibit (C-Exh.) 24.

In early 1990, Complainant applied for the position of Quality Control receiving inspector. Under the recently implemented Staff Augmentation Program (SAP), four contractors submitted Complainant's name to TU Electric for one of six receiving inspector positions. Upon telephoning TU Electric in late July 1990, Complainant learned that he had not been placed

[PAGE 3]

in any of the positions. (Two positions were filled on July 10 and the remaining four were filled on July 17.) He was not advised, however, that TU Electric's procurement compliance supervisor had rated him unfavorably in considering his application, nor did he possess a copy of the SAP procedures. On August 8, Complainant met with Susan Palmer, the "stipulation manager" for TU Electric,[3] to request information about the SAP decision making process. Palmer responded on September 28 that TU Electric had filled the receiving inspector positions with incumbent employees and enclosed a copy of SAP procedures. C-Exh. 46.

By letter of September 29, Complainant requested Palmer's assurance that he would be considered for any position for which

he was qualified, not merely for the position of receiving inspector. C-Exh. 47. On October 30, Palmer responded that she was not responsible for hiring and that Complainant would need to contact the proper personnel. She also directed him to a letter of recommendation (C-Exh. 44) that he had been provided in July and added that by providing him with the letter, TU Electric had satisfied its commitments under the earlier section 210 settlement agreement. C-Exh. 48. Upon reviewing these materials, Complainant concluded that TU Electric was manipulating its employment practices to avoid hiring him.[4] He filed the instant section 210 complaint on November 8, 1990.

DISCUSSION

The ALJ found the November 8, 1990, discrimination complaint to be untimely because it was filed more than thirty days after Complainant learned that he had not secured a receiving inspector position in July 1990.[5] I disagree.

The section 210 limitations period is not jurisdictional and is subject to modification, for example by application of the doctrine of equitable tolling. That doctrine "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991) (Age Discrimination in Employment Act of 1967).

Under the analysis in *Baxter Healthcare*, Complainant was "injured" prior to July 1990 when he received an unfavorable rating in the application process and during July when Respondent rejected him for the position of receiving inspector. His claim accrued, however, on the date he discovered that he had been injured. Although he learned in late July that he had not been placed in any of the positions, he discovered the unfavorable rating at a later date.[6] Accordingly, in late July Complainant knew that he had been injured to the extent that he had not been

[PAGE 4]

offered a job, but he did not necessarily know that the injury was due to wrongdoing on the part of Respondent. The question then becomes whether a reasonable man in Complainant's position would have known prior to receipt of Ms. Palmer's correspondence, including the October 30, 1990 letter, that he had been rejected in possible violation of the ERA. If not, "the doctrine of equitable tolling could suspend the running of the statute of limitations for such time as was reasonably necessary to conduct the necessary inquiry." *Id.*[7]

Additionally, the alleged discrimination is not simply the failure to hire Complainant as a receiving inspector in July, but an ongoing unwillingness to consider him for employment which was precisely what Palmer's October 30 letter implied. Contrary to her representation, the letter of recommendation, tendered to Complainant in July and apparently intended for contractors and other employers,[8] did not absolve TU Electric of its own obligation under the settlement agreement. The settlement required TU Electric to "fairly and equitably consider [Complainant] for further employment at CPSES Unit 2, when construction commences, and during refueling outages at Unit 1,

provided that he apply for and be qualified for the positions available at [CPSES]." The Palmer letter, then, could be read to mean that from July forward TU Electric would not consider Complainant for positions at CPSES because it no longer recognized an obligation to do so.

In this regard, the letter suggested a policy to deny Complainant consideration which by its very nature was continuing. *Egenrieder v. Metropolitan Edison Co.*, G.P.U., Case No. 85-ERA-23, Sec. Rem. Ord., Apr. 20, 1987, slip op. at 4-6. Cf. *OFCCP v. CSX Transportation, Inc.*, Case No. 88-OFC-24, Sec. Rem. Dec., Oct. 13, 1994, slip op. at 22-23 (under one theory of "continuing" violation, the focus is on what event should have alerted the employee to protect his rights or on when he should have perceived that discrimination was occurring). Accordingly, the complaint also contains elements of a continuing violation which could render it timely. The suggestion of an ongoing policy is not developed in the record, however. Noticeably absent is any questioning of Palmer as to the meaning she ascribed to the phrasing. In the absence of such evidence, I am unable to find on this record that TU Electric had decided to blacklist Complainant as a matter of course and that the violation was continuing.

I find, however, that the limitations period was tolled under the doctrine of "equitable tolling" discussed in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 451-453.[9] At the end of July 1990, Complainant knew only that he had been rejected for the position of receiving inspector. He then proceeded with due

[PAGE 5]

diligence to obtain information about the newly-implemented Staff Augmentation Program which revealed certain irregularities in hiring the receiving inspectors and suggested that Complainant had not received impartial consideration. Because Complainant filed the November 8 complaint almost immediately after receiving the October 30 letter, the complaint is not time-barred. *Id.* at 452-453 (plaintiff who invokes tolling to suspend limitations period "must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information").[10]

In making a contrary finding, the ALJ acknowledged that "[t]he fact that Complainant knew that the six positions had been filled does not mean that he had knowledge that Respondent acted in a discriminatory manner in their selection." R. D. and O. at 6. He also acknowledged that in meeting and corresponding with Palmer, Complainant "[c]learly . . . was . . . looking for answers." *Id.* The ALJ ultimately found the complaint untimely, however, in part because Palmer's responses assertedly did not provide evidence of discrimination. In so finding, the ALJ missed the significance of Palmer's disclosures. Initially, she advised Complainant that the incumbents had been retained and provided him with a copy of Respondent's Staff Augmentation Program. C-Exh. 46. Having worked with the incumbents previously, Complainant was in a position to assess their relative qualifications and determine whether they fit within the SAP contractor requirements. Complainant testified that he considered himself better qualified than most of the incumbents and that he believed some of them to be unqualified for the

position. T. 8/21/91 at 499-504. Then, in the October 30 response to Complainant's request that he be considered for all positions for which he was qualified, Palmer stated that Respondent had satisfied all commitments to him under the settlement agreement, implying that it was not obligated to accord him impartial consideration. I disagree with the ALJ that these disclosures would not reasonably alert an employee to possible impropriety, and I reject the contrary finding.

I turn now to the merits of the complaint. Under the ERA, a complainant can raise an inference of discrimination by establishing a *prima facie* case. The ALJ found that Complainant failed to do so. R. D. and O. at 17. I disagree. This burden is not onerous. Cf. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (Title VII of the Civil Rights Act of 1964). An ERA complainant need merely show that the employer is subject to the Act, that the complainant engaged in protected activity, that the employer knew about the activity, that the employer took adverse employment action, and that a causal nexus exists between the protected activity and adverse action.

[PAGE 6]

Carroll v. Bechtel Corp. (Carroll), Case No. 91-ERA-46, Sec. Dec., Feb. 15, 1995, slip op. at 9-10, appeal docketed, No. 95-1729 (8th Cir. March 27, 1995). "Proximity in time is sufficient to raise an inference of causation." *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995), citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (causal connection established by showing that employer was aware of protected activity and that adverse action followed closely thereafter).

As I have noted in several decisions, see e.g. *Carroll*, slip op. at 8-12, once a case has been fully tried on the merits, the answer to the question of whether the complainant presented a *prima facie* case is no longer particularly useful. I will discuss below the *prima facie* causal nexus presented in this case in order to clarify the ALJ's analysis, but note that since the Respondent presented rebuttal evidence, the appropriate question to ask is whether Complainant proved by a preponderance of the evidence that he was discriminated against in violation of the ERA.

The ALJ found that Respondent was an employer subject to the ERA and that Complainant engaged in protected activity. R. D. and O. at 9-10. These findings are fully supported by the record, and I adopt them. The ALJ also found adverse action in Respondent's failure to rehire Complainant, but declined to find the requisite causal nexus. R. D. and O. at 10, 17. While I adopt the ALJ's former finding, I reject the latter. As stated above, temporal proximity -- present here -- in conjunction with Respondent's knowledge of Complainant's protected activity suffices to show causation for purposes of the *prima facie* case.

In particular, Complainant's section 210 complaint about the Thermo-Lag incident and his subsequent layoff culminated in a settlement finalized on March 30, 1990. Acting on Complainant's separate complaint, the NRC investigated the incident and cited and fined TU Electric on May 17, 1990. TU Electric paid the fine

in June 1990. Selection of the six receiving inspectors occurred during May and June 1990, and the positions were filled in July 1990. Accordingly, the effects of Complainant's protected activity and the adverse action were sufficiently confluent to establish causation.

Complainant also charges that Respondent blacklisted him by sending letters to contractors that identified him as a whistleblower. On October 12, 1990, William Cahill, TU Electric's executive vice president, wrote to each of the 300 CPSES contractors about discriminatory employment actions and in a November 9, 1990, follow-up, he requested that he be notified of any discrimination complaints brought against any contractor. C-Exhs. 40 and 42. While the October 12 letter reflects concerns

[PAGE 7]

raised by the NRC in the Thermo-Lag incident and uses the "fair and equitable" consideration language found in Complainant's section 210 settlement agreement, neither the incident nor the agreement is referenced specifically. Complainant also is not named. The November 9 letter requests that Cahill be notified of any discrimination complaint filed in a variety of forums, including any section 210 complaint filed with the Department of Labor. No reference appears to Complainant's complaint. After close examination of this correspondence and the context in which it arose, I must agree with the ALJ that it is essentially ameliorative and "constitute[s] a positive effort by the Respondent to guard against harassment of employees" R. D. and O. at 12. I simply do not discern any *sub rosa* message to blacklist Complainant. It thus fails to constitute adverse action.

Once Complainant created an inference of retaliation by establishing a *prima facie* case, the burden shifted to Respondent to articulate a legitimate nondiscriminatory reason for failing to hire Complainant. "[T]he employer need not persuade the court; the burden is simply one of production." *Kahn v. United States Secretary of Labor*, 64 F.3d 271, 278 (7th Cir. 1995). Respondent met this burden by articulating such a reason: operation of its Staff Augmentation Program. Consequently, the presumption created by the *prima facie* case was dissolved, and Complainant assumed the burden of proving that the proffered reason was pretextual.[11]

In attempting to prove pretext, Complainant points to perceived irregularities in the application of the Staff Augmentation Program. The ALJ largely credited Respondent's explanations, however, and I find ample basis in the record for the associated findings. See R. D. and O. at 10-16.

Briefly, in late 1989 Respondent began development of the Staff Augmentation Program in an effort to reduce the cost of employees supplied by contractors.[12] Initially, it solicited proposals and selected nine contractors to become "General Staff Augmentation Contractors." See Respondent Exhibit (R-Exh.) 42. Selection of employees also was subject to negotiation, to set a commercial rate for the loaned employee services, with both employee qualifications and cost being considerations. "Respondent believed that by limiting the number of staff augmentation contractors to those with bidding rates approved by

Respondent, more control could be exercised over the cost of loaned employees and ultimately, the cost of labor would be reduced." R. D. and O. at 11. Lance Terry, the CPSES director of nuclear overview, testified:

The main purpose of the staff augmentation program . . . was to get more commercially acceptable rates.

[PAGE 8]

These staff augmentation contractors presented markups that were significantly below the markups that had been charged by the previous personnels providing those people to us. [B]y going to the staff augmentation concept, we were able to reduce the average markup on the part of contractors from about 1.9 to about 1.4. [Management] estimated that would save us around \$18 to \$20 million a year in contracts.

T. 8/26/91 at 130.

Although the staff augmentation employees were supplied and compensated by contractors, Respondent was responsible for managing them as it was for its "Direct Hire" personnel. *Id.*[13] Essentially, staff augmentation employees were brought in to supplement Respondent's direct hires. As Terry explained:

Although we completed Unit One and Unit One is operational now, we still have not established enough experience with our organization to really be able to sit down now and say this is the final size that we want our organization to be in order to support operation of Unit One, much less two unit operations when Unit Two completes. As a result of that, we have deliberately tried to hold our staffing level at the approximately 1,200 to 1,300 level, which is where we've been with TU personnel for a while and augment that staff with contractors until such time as we can establish clearly how many TU people we need in order to do our job, at which time we'll try to have TU people and augment with contractors only for temporary assignments.

T. 8/26/91 at 108.

Some of the positions subject to staff augmentation already were filled by employees who worked for contractors other than those selected as General Staff Augmentation Contractors. Certain incumbents were well qualified, experienced and had performed well in their jobs. Terry testified: "We were just getting into the operation of the plant. It would have been very disruptive for us to take . . . a lot of those people who were supporting operation . . . and replace them with new people that weren't familiar with our procedures" *Id.* at 128. See *id.* at 131-133. As a result, Respondent negotiated separately with several contractors, including Brown and Root, Ebasco and Fluor Daniel, who were then designated "Special Staff Augmentation Contractors," in order to retain some of the incumbents.

The six incumbent receiving inspectors had been employed by Brown and Root. Because their positions were processed prior to

[PAGE 9]

its becoming a Special Staff Augmentation Contractor, these employees applied for the receiving inspector positions along with 26 other applicants, including Complainant. Because of their superior work performance and Respondent's general desire to retain crucial incumbents, they received the highest ratings and were offered the positions. Upon acceptance, they apparently were "rolled over" for employment by a General Staff Augmentation Contractor.[14] T. 8/21/91 at 343. While a degree of "manipulation" appears at play in evolving the augmentation program, Respondent's motivation was continuity of operation rather than retaliation against Complainant. In explaining why he promoted a "rollover," Danny Leigh, the CPSES procurement compliance supervisor, testified: "[W]e only had six [receiving] inspectors at that time. And, we were getting ready to go operational, and I could not afford to let all six of my inspectors walk out the door on one day and leave me with no inspection personnel." *Id.* at 358.

Admittedly, Complainant received an unfavorable rating when he applied for the receiving inspector position but, again, the reason was not retaliatory. Leigh, who rated the applicants, testified that while Complainant had worked previously as a receiving inspector, his "heavy background was operational support during outage[s]."[15] *Id.* at 328. He considered Complainant to be a "job shopper" who preferred to work outages because "[t]hat's where the money was at." *Id.* at 358. Leigh, on the other hand, was looking for inspectors who would stay in the job "for a period of time" and pointed out that some of the incumbents had been at the project for as many as 13 years.[16] *Id.* at 332-333. Leigh testified:

I give those people [the incumbents] the credit for what they were doing at the time. They were currently certified. They were doing the job. And, again, they were good employees. They were meeting my expectations as inspectors at the time of this review and evaluation. [T]hat's just the way that I done that. I give them credit for what they were doing.

Id. at 352. Moreover, the incumbents had survived at least two reductions of force (ROF), including one in November 1989 when Complainant was laid off, and one in April 1990. The fact that performance is considered under Respondent's ROF policy suggests that these inspectors were well qualified. T. 8/27/91 at 307-309.

Finally, Complainant argues that some of the incumbents did not meet a criterion in the receiving inspector position description, namely that the applicant have two years of experience in receipt inspection. Comp. Mem. at 23. I agree

[PAGE 10]

with the ALJ, however, R. D. and O. at 14-15, that the function of the position description was to screen outside applicants in the event that Respondent was unable to retain the incumbents and that it did not apply to current employees who were NRC qualified, certified and performing well. T. 8/21/91 at 318-319; T. 8/26/91 at 142-144. In addition, contrary to Complainant's

contention, Comp. Mem. at 22-23, the fact that the incumbents' billing rates slightly exceeded Complainant's rate is not dispositive since Respondent considers whether rates fall within an acceptable price range rather than merely hiring the least expensive applicants. T. 8/26/91 at 123. Complainant thus failed to prove that Respondent's proffered reason for denying him employment as a receiving inspector was pretextual. As the record contains no evidence that he was bypassed for additional positions or otherwise blacklisted, that portion of the complaint also must fail.

CONCLUSION

Although the complaint was not time-barred under the circumstances presented here, Complainant failed to prove that he was subject to unlawful discrimination. In rendering this decision, I am mindful that Respondent, under the settlement entered into between the parties, has a continuing obligation to treat Complainant fairly and equitably in making future hiring decisions and that Respondent has not complied with its obligations under that settlement agreement by simply providing Complainant with a letter of recommendation. Accordingly, the complaint IS DISMISSED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]

The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case in which the complaint was filed prior to the effective date of that Act. For purposes of this case, I will continue to refer to the provision as codified in 1988.

[2]

Thermo-Lag is insulation housing electrical conduits and cable trays which provides a fire barrier.

[3]

The stipulation arose out of TU Electric's application for an operating license and construction permit amendment before the NRC Atomic Safety and Licensing Board. Among other things, the stipulation authorized CASE, an intervenor in the proceeding, to participate in CPSES Quality Assurance audits and NRC inspection activities. C-Exh. 1.

[4]

Complainant testified that although he submitted his resume to contractors on numerous occasions, he received no inquiries from TU Electric's contracting office requesting his billing rate -- an early step in the bidding process. T. 8/21/91 at 457-459. Contractors also represented that they had failed to receive Complainant's resume and that they were not hiring when Complainant had been told otherwise and "in fact . . . had friends that had gone to work for them." *Id.* at 451, 461-462, 468, 508, 510.

[5]

At the time of the complaint, the ERA provided that any employee who believed that he had been subject to discrimination in violation of section 210(a) "may, within thirty days after such violation occurs, file a complaint with the Secretary of Labor alleging such . . . discrimination." The ERA has since been amended to allow a complainant 180 days in which to file a discrimination complaint. 42 U.S.C. § 5851(b)(1) (1992).

[6]

The common law "discovery rule," which postpones the commencement of the limitations period from the date of injury to the date the injury is discovered, is consistent with the holding in *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), that a statute of limitations begins running when the adverse decision is made *and communicated* to a complainant. *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 450.

The unfavorable rating was probably undeserved and, at minimum, highly arbitrary. R. D. and O. at 12, 14. While constituting adverse action, it also suggested that Complainant did not receive impartial consideration for the receiving inspector positions.

[7]

The court stressed its use of the term *possible* violation: "If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run -- for even after judgment, there is no certainty." 920 F.2d at 451.

[8]

The letter of recommendation stated: "To Whom It May Concern: Frank Bausemer should be fairly considered for employment at CPSES in positions for which he has applied and is qualified. While employed at CPSES, Mr. Bausemer's actions in pursuing his concerns through SAFETEAM and the Nuclear Regulatory Commission were consistent with TU Electric's policy and appreciated by management as being taken to assist them in insuring the safety of the facility." C-Exh. 44. The letter was signed by William Cahill, TU Electric's executive vice president.

[9]

I do not invoke the doctrine of "equitable estoppel," also discussed in *Cada v. Baxter Healthcare Corp.*, 920 F.2d at

450-451, "which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations."

[10]

The doctrine of equitable tolling adjusts the rights of two innocent parties, as opposed to the doctrine of equitable estoppel where one of the parties has misled the other. Recognizing this distinction, the court stated: "We do not think equitable tolling should bring about an automatic extension of the statute of limitations by . . . any . . . definite term It gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations." 920 F.2d at 452.

[11]

I apply the analytical model set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Contrary to Complainant's suggestion, Comp. Mem. at 25, the "dual motive" model applied in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), does not come into play because Complainant did not prove by a preponderance of the evidence that Respondent was motivated by an illegitimate reason. Consequently, the burden does not shift to Respondent to prove that it would have taken the adverse action for a legitimate reason alone.

[12]

Respondent completed construction of CPSES Unit 1 in late 1989 and in January 1990 received an NRC license to load fuel and begin low power operations. Commercial operation began in August 1990. Construction of Unit 2, which had been suspended in 1988, resumed in 1991. The need for staffing revisions arose with the transition from construction to operation.

[13]

The remaining variety of employee at CPSES was employed by "Scope of Work" contractors. These contractors were responsible for hiring and managing their employees to perform designated functions, for example, security, major construction, engineering or quality control "scopes" at either Unit 1 or 2. T. 8/26/91 at 106-107. These jobs were not permanent. "When the scope of work is done, the contract should be over. *Id.* at 108.

[14]

Complainant argues that "rollovers" were discouraged under the Staff Augmentation Program. This limitation appeared exclusively in an early draft of the program, however, and did not survive later revision. Compare C-Exh. 35 (dated November 1989) with C-Exhs. 36 and 37 (dated April and May 1990). I adopt the ALJ's findings on this point. R. D. and O. at 16.

[15]

Complainant testified: "In nuclear power plants, they have to refuel. . . . They have an outage schedule that runs approximately once a year. They have to shut the plant down.

They perform any maintenance that's needed. And, they replace fuel rods inside the reactor." T. 8/21/91 at 475. Outages usually are completed within a three-month period. *Id.*

[16]

In fact, the six incumbents had worked at CPSES a minimum of seven years and a maximum of 14 years. R-Exhs. 7a-f. In contrast, Complainant had held 16 different jobs during the preceding twelve years. C-Exh. 75.